IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1361

DECOTO AIRCRAFT, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

WESLEY M. WILSON
605 Miller Building
Yakima, Washington 98901
Attorney for Petitioner
Decoto Aircraft, Inc.

IN THE

Supreme Court of the United States

October Term, 1974

No._____

DECOTO AIRCRAFT, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

WESLEY M. WILSON
605 Miller Building
Yakima, Washington 98901
Attorney for Petitioner
Decoto Aircraft, Inc.

SUBJECT INDEX

	Page
Opinions Below	2
Grounds for Jurisdiction in This Court	3
Constitutional Provisions and Statutes Involved	4
Questions Presented	4
Statement of the Case	5
(a) Basis for Federal Jurisdiction in First Instance	5
(b) Summary of Facts and Procedure before the Board	6
(c) The Decision of the Court of Appeals	9
Argument for Granting the Writ	9
Conclusion	15
Appendix Index	16

CASES

Henderson Trumball Supply Corporation v. N.L.R.B. 501 F.2d 1224 (1974)	11
Magnesium Casting Co. v. N.L.R.B., 401 U.S. 137, 76 L.R.R.M. 2497 (1971)	13
National Furniture Company, Inc., 119 N.L.R.B. 328 (1957)	10
Nickols v. Gagnon, 454 F.2d 467 (7th Cir. 1971)	12
N.L.R.B. v. Ancillary Services, Inc., 478 F.2d 96 (1973)	12
N.L.R.B. v. Bata Shoe Company, Inc., 377 F.2d 821 (4th Cir. 1967), cert. den., 389 U.S. 917 (1967)	14
N.L.R.B. v. Commercial Letter, Inc., 455 F..2d 109 (8th Cir. 1972), opinion modified, 455 F.2d 109	14
N.L.R.B. v. Indiana & Michigan Electric Co., 318 U.S. 9 (1943)	14

CASES Con't.	Page
Orleans Manufacturing Company, 120 N.L.R.B. 630 (1958)	10
Pittsburgh Plate Glass Co. v. N.L.R.B. 313 U.S. 146, 8 L.R.R.M. 425 (1941)	13
Tidewater Oil Co., v. N.L.R.B., 398 F.2d 363 (2nd Cir. 1966)	15
Wilson-Sinclair Co., 191 N.L.R.B. 341 (1971)	11

IN THE

Supreme Court of the United States

October Term, 1974

No.....

DECOTO AIRCRAFT, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Decoto Aircraft, Inc. (herein sometimes referred to as "Decoto"), Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above entitled cause on March 6, 1975.

OPINIONS BELOW

This Petition results from a decision of the United States Court of Appeals for the Ninth Circuit affirming and enforcing without modification the Decision and Order of the National Labor Relations Board (hereinafter referred to as the "Board"). These decisions, in chronological order, are as follows:

1. On June 14, 1973, the Board issued its Decision and Direction of Second Election in the representation case, No. 19-RC-6371, in this matter. This decision is reproduced herein as Appendix "A" to this Petition. This decision was unreported.

2. On April 3, 1974, the Board issued its Decision and Order in the unfair labor practice case, granting the motion for summary judgment requested by the Board's General Counsel, ordering Decoto, Petitioner herein, to cease and desist from refusing to bargain with the Union. This decision has been reported at 209 N.L.R.B. No. 149, 85 L.R.R.M. 1615 (1974).

This decision is reproduced herein as Appendix "B" to this Petition.

3. The decision of the United States Court of Appeals for the Ninth Circuit (hereinafter referred to as the "Opinion") affirmed and enforced *in toto* the decision of the Board. The opinion is reported as –F.2d–, 88

L.R.R.M 3231 (9th Cir. 1975), and is reproduced herein as Appendix "C" to this Petition.

GROUNDS FOR JURISDICTION IN THIS COURT

The Opinion below decides and applies several important questions of federal law contrary to decisions of other Courts of Appeals as well as certain important questions of first impression, which until now have not been, but ought to be, decided by this Court. On this basis, petition is made to this Court pursuant to U.S.C.A. Section 1254 and U.S. Supreme Court Rule 19, for certiorari to review the opinion below.

The Opinion below was dated and entered on March 6, 1975. The Petitioner herein on April 4, 1975 sought an application for a rehearing *en banc* by the Ninth Circuit, but the Court considered the application to be too late. The Petitioner herein then filed on or about April 16, 1975 with the Ninth Circuit a motion to recall the mandate of the Court, and on the same date Petitioner herein filed a motion to file a late application for a rehearing *en banc*. These motions were denied by the Ninth Circuit Court of Appeals by an order dated May 7, 1975.

An application has been made to the Ninth Circuit Court of Appeals for a stay of mandate of its order to November 15, 1975. The Ninth Circuit has not yet ruled on this request.

No order has been sought or granted for an extension of time in which to petition for Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provision involved herein is the due process clause contained within the Fifth Amendment to the United States Constitution. The statutes involved in the cause are contained within the Labor Management Relations Act (hereinafter referred to as the "Act"), Sections 7; 8 (a) (1), (5); 9 (a) (1), (c) (1) (4), (d); 10 (b), (c), (e), as Amended, (29 U.S.C.A. Sections 157; 158 (a) (1) (5); 159 (a) (1), (c) (1) (4), (d); 160 (b), (c), (e)), as well as Federal Rules of Civil Procedure 43 (c) (28 U.S.C.A.), and the Rules and Regulations of the National Labor Relations Board, Sections 102.62 and 102.69 (c). The constitutional provision and the statutes cited, in pertinent part, are printed verbatim and are reproduced herein as Appendix "D" to this Petition.

QUESTIONS PRESENTED

1. Did Decoto timely present sufficient evidence so as to raise a substantial issue of fact as to the report of the Board's regional director on objections to the election, thereby entitling Decoto to a hearing on those issues of fact, where the regional director found that none of the objections filed by the Union, standing alone, has merit,

but on the basis of the regional director's later investigation he recommended setting aside the election based on his "additional findings" made *ex-parte,* which factual findings Decoto's attorney rebutted in detail in timely-filed exceptions signed by the attorney, but not by sworn affidavits?

2. Did the Board, by quashing Decoto's subpoena duces tecum for any evidence to support the regional director's findings of fact made *ex parte* and by refusing to grant Decoto's timely requests for any hearing on substantial issues of fact, and by the granting of the General Counsel's motion for summary judgment after Decoto presented to the Board sworn statements contradicting the regional director's findings of fact made *ex parte,* violate the requirements of due process?

3. Did the Stipulation for Certification Upon Consent Election Agreement, signed by the regional director, the Union, and Decoto, constitute a contract between the three named parties, thereby entitling Decoto to a decision on the merits of the objections by the Board, not the regional director?

STATEMENT OF THE CASE

(a) BASIS FOR FEDERAL JURISDICTION IN FIRST INSTANCE

The action herein was brought before the Board on

charges filed alleging that Decoto had violated the Act; more particularly, Sections 8 (a) (1) and (5) thereof, as well as other sections of the Act not now in issue. The court below had jurisdiction by virtue of Sections 10 (e) and (f) of the Act.

(b) SUMMARY OF THE FACTS AND PROCEDURE BEFORE THE BOARD

The Union filed a petition for an election among employees of Decoto on October 24, 1973. Balloting conducted on November 28, 1973 showed that the Union received 45 votes and there were 49 "no" votes. The Union filed timely objections to the election.

On March 30, 1973 the Board's regional director served on the Union and on Decoto his Report on Objections To Election (hereinafter called "Report"). (The Report is reproduced herein as Appendix "E" to this Petition.) In his Report the regional director found no merit to Union Objections Nos. 1 and 2. Objection No. 3 alleged that Decoto transfered an employee from the day to the night shift and that employee became the Union's observer in the election. The regional director found that the transfer referred to in Objection No. 3 was not, when looked at alone, an act of interference with the election.

However, the regional director in his Report made five "Additional Findings" which he believed related

somehow to Objection No. 3, the transfer of an employee, and he recommended that the election be set aside.

Decoto filed timely Exceptions to the regional director's Report. In said exceptions, signed by Decoto's attorney, Decoto stated its position on Objection No. 3, that the transfer of the employee was made in accord with normal practice for business reasons, prior to Decoto's knowlerge that the employee was a Union supporter or that he would later be the Union's observer in the election.

In Decoto's Exceptions, each of the regional director's "Additional Findings" was discussed in some detail. Decoto contended that the subject of each additional finding is irrelevant, but stated that the "facts" as found by the regional director in his *ex parte* investigation are for the most part, either denied or erroneous or incomplete. Decoto in its Exceptions summarized its version of the facts and stated that if the Board finds any of the regional director's "Additional Findings" to be relevant that Decoto requests a hearing and will provide witnesses to testify to support Decoto's version of the facts. A copy of Decoto's Exceptions is reproduced herein as exhibit "F" to this Petition.

The Board on June 14, 1973 issued its "Decision and Direction of Second Election." (Appendix "A" to this Petition). The decision is *pro forma,* adopting the regional director's *ex parte* decision as if no Exceptions had been

filed. However, in footnote 1 the Board states:

> In the absence of exceptions thereto, the Board adopts *pro forma* the Regional Director's recommendation that Objections 1 and 2 be dismissed. The Employer's request for a hearing is hereby denied because the Employer, having received *reasonable notice* of specific conduct alleged to have interferred with the election, refused to present *any evidence* rebutting these allegations to the Regional Director. (Emphasis supplied).

A second election was conducted which the Union won, by one or two votes. Decoto refused to bargain with the Union, questioning whether the Union represented a majority of the employees. The regional director on October 17, 1973 issued a complaint. The complaint's only allegation of any unfair labor practice by Decoto is the refusal to recognize and bargain with the Union which it is alleged violated Section 8 (a) (5) and derivitively, Section 8 (a) (1) of the Act.

Decoto in its answer alleged that the certification by the Board of the Union was improper and that the Union has not represented a majority of its employees.

The Board's regional director scheduled a hearing before an administrative law judge for November 20, 1973. Decoto then issued a *subpoena duces tecum* to the Regional Director's agent who investigated the Union's objections, to appear and testify and to produce certain employee statements concerning the regional director's *ex parte* find-

ings. Decoto's appeal from the denial of this request was denied November 2, 1973 by telegram of the Board's General Counsel, who stated in part:

> This acton is without prejudice to your right to request affidavits of witnesses called on behalf of the General Counsel or the Charging Party after their direct testimony in the hearing in this matter. [R.51].

The regional director then promptly filed with the Board a motion for summary judgment. The Board quickly granted the motion and issued a notice to show cause.

Decoto timely filed its answer to the motion together with sworn affidavits, each rebutting in detail the findings of fact made by the Regional Director in his Report on objections, and again requesting a hearing on the issues of fact.

The Board issued its Decision and Order (Appendix "B" to this Petition), found that Decoto "is now attempting to relitigate issues which were decided adversely to it in the underlying representation proceeding" and ordered Decoto to bargain with the Union.

(c) THE DECISION OF THE COURT OF APPEALS

The Court of Appeals enforced the Board's order without change.

ARGUMENT FOR GRANTING THE WRIT

1. The decision below that Decoto did not offer *any*

evidence to rebut the regional director's additional findings of fact is contrary to decisions of other Courts of Appeal as to what constitutes "any evidence." This finding becomes crucially important when considered in the view that the federal Courts of Appeal almost uniformly hold that an employer (or a union) is entitled to a hearing on objections to an election if there are substantial and material issues of fact timely presented. The Ninth Circuit has so held in at least five cases, which were presented to the Ninth Circuit in Decoto's brief.

Both the Board and the Ninth Circuit found the regional director's "additional findings" to be material. The issues are thus presented to this Court (1) whether those additional findings were outside the scope of the Union's objections, (2) whether Decoto, in the representation case before the Board, had an obligation to present any evidence to raise issues of fact as those additional findings, and (3) if so, whether Decoto met that obligation by furnishing "any evidence."

The Union's three objections were specific. However, they did not allege any acts or conduct closely related to the conduct found by the regional director in his additional findings to have occurred. Decoto was entitled to rely upon the Board's almost uniform rules that objections must name specific conduct alleged to have occurred. *National Furniture Company, Inc.*, 119 N.L.R.B. 328 (1957); *Orleans Manufacturing Company*, 120 N.L.R.B. 630 (1958); *Wilson-Sinclair Co.*, 191 N.L.R.B. 341 (1971).

Decoto's Exceptions to the regional director's additional findings in his Report were in as much detail as the regional director's findings. It would be difficult to be more specific in Exceptions, where the regional director's findings do not name or otherwise identify any witness except Decoto's supervisory witnesses, and in the investigation and later by sworn affidavits they denied the substance of most of the findings made by the regional director.

The Exceptions were signed by Decoto's attorney. The Second Circuit, in *Henderson Trumball Supply Corporation v. N.L.R.B.*, 501 F.2d 1224 (1974), in directing a hearing, recently held that statements signed by the employer's attorney should be accorded the same weight as would be attributed to a pleading so signed, citing F. R. Civ. P., Rule 11.

Decoto contends that its Exceptions to the regional director's Report constitutes a "pleading" within the meaning of Rule 11, Fed. R. Civ. Proc. Rule 11 states in part:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good grounds to support it; and that it is not interposed for delay.

The decision of the Board and of the Ninth Circuit have the effect of striking a pleading, Decoto's Exceptions.

The Sixth Circuit has held that a party may make an offer of proof by a statement signed by its attorney. *N.L.R.B. v. Ancillary Services, Inc.*, 478 F.2d 96 (1973).

Decoto contends that its Exceptions here were in as much or more detail than the four page letter found by the Seventh Circuit to be "not a mere 'conclusory statement'," in *Nickols v. Gagnon*, 454 F.2d 467, 469 (7th Cir. 1971), cert. den 408 U.S. 925. That Court opinion does not reproduce the letter but it was substantially shorter than Decoto's detailed Exceptions herein.

Neither the statute nor the Board's Rules and Regulations require that Exceptions to a regional director's report on objections be supported by signed affidavits in order to raise a substantial issue of fact. If the Board requires a greater degree of proof than do federal courts, the Board should amend its Rules and Regulations to give parties practicing before the Board clear notice of such stringent requirements.

2. Decoto has consistently and timely requested a hearing in both the representation case and the unfair labor practice case. The Board denied all of the requests, and granted the motion for a summary judgment, requested by the Board's General Counsel.

This Court has approved the summary judgment procedure in *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 8 L.R.R.M. 425 (1941) and in *Magnesium Casting Co. v. N.L.R.B.*, 401 U.S. 137, 76 L.R.R.M. 2497 (1971). But in each of those cases the respondent was *granted* a hearing in the representation case proceeding on the issue later raised in the unfair labor practice proceeding. As this Court points out in *Magnesium*, Congress in 1959 added section 3 (b) of the Act, which permits the regional director "to investigate and provide for hearings, and determine whether a question of representation exists. . ." In *Magnesium* the regional director held a hearing on the representation matter and made certain findings; this Court held that the employer was not entitled to a plenary review of those findings. In the instant case, Decoto's representation matter did not involve a hearing under section 3 (b) of the Act. Decoto signed the Board's "Stipulation For Certification Upon Consent Election," thereby making that stipulation, not section 3 (b), determinative in the resolution of objections to an election.

Due process may not require a hearing on issues of fact in both the representation case and in the unfair labor practice case. However, Decoto contends that due process requires a hearing on substantial issues of fact in either the representation case or the unfair labor practice case, unless a respondent has clearly waived any right to

a hearing. See *N.L.R.B. v. Bata Shoe Company, Inc.*, 377 F.2d 821 (4th Cir. 1967), cert. den. 389 U.S. 917 (1967), and *N.L.R.B. v. Commercial Letter, Inc.*, 455 F.2d 109 (8th Cir. 1972), opinion modified, 455 F.2d 109.

This Court, in *N.L.R.B. v. Indiana & Michigan Electric Co.*, 318 U.S. 9 (1943), stated:

> The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

Decoto, the Union, and the regional director signed a Stipulation for Certification Upon Consent Election Agreement. Section 9 (c) (4) of the Act permits such a stipulation "in conformity with regulations and rules of decision of the Board." The three-party agreement stipulates to findings on objections to the election by the Board, not by the regional director, under the Board's Rules and Regulations.

The Board's Rules and Regulations, sections 102.62 (b) and 102.69 (c), provide that for elections conducted pursuant to a stipulation agreement, as Decoto signed, should there be any objections, the *Board* will make the determination. This procedure differs from that provided in the usual consent election agreement, which permits the regional director to make the determination. It also differs from the situation where there is no agreement for an election, but the Board, or the regional director by delegation under section 3 (b) of the Act, makes the determination, as in *Magnesium, supra*.

Another Court of Appeals has held that the stipulation for certification constitutes a contract between the employer, the union, and the regional director, which cannot be violated by the Board. *Tidewater Oil Company v. N.L.R.B.*, 358 F.2d 363 (2nd Cir. 1966).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Wesley M. Wilson
605 Miller Building
Yakima, Washington 98901
Phone: (509) 452-2828

APPENDIX INDEX

Appendix A	Board's Decision in Representation Matter
Appendix B	Board's Decision in Unfair Labor Practice, 209 N.L.R.B. No. 149
Appendix C	Decision of Court of Appeals for the Ninth Circuit
Appendix D	Fifth amendment to U.S. Constitution; Statute; Rules and Regulations of the Board
Appendix E	Regional Director's Report on Objections to Election
Appendix F	Exceptions to Regional Director's Report on Objections to Election